

At the settlement hearing held on this claim the issue whether respondent would pay medical bills claimant incurred with Dr. W. Steven Trombold was discussed. It was agreed that if the doctor related his evaluation and treatment to claimant's occupational injury then respondent would pay his bills. A lump sum full and final settlement was then entered subject to that agreement regarding Dr. Trombold's billings.

The claimant then brought a proceeding seeking post-award medical treatment to recover the amount of Dr. Trombold's billings. The Administrative Law Judge (ALJ) denied claimant's request for payment of the medical treatment provided by Dr. Trombold because there was insufficient evidence in Dr. Trombold's medical notes to indicate that his evaluation and treatment was due to claimant's work-related injury. Moreover, the ALJ determined that the referral to Dr. Trombold was from claimant's personal physician and not the authorized treating physician.

Claimant requests review of whether the ALJ erred in denying payment of Dr. Trombold's bills. Claimant argues the treatment she received from Dr. Trombold was due to a referral from her primary care physician but claimant's authorized treating physician had referred the claimant to her primary care physician. Consequently, claimant further argues the evidence supports her contention that Dr. Trombold's evaluation should be paid by respondent as authorized medical treatment.

Respondent raises the following issues on review: (1) whether claimant is bound expressly to the terms of her settlement, and is precluded from pursuing this post award hearing by the doctrines of waiver and estoppel; (2) whether there is a procedural or factual basis for an award of medical benefits against respondent; (3) whether claimant is precluded from recovery of the majority of the requested benefits under K.S.A. 44-510k(b); and, (4) whether the respondent is entitled to attorney fees and costs incurred in conjunction with the defense of this application pursuant to K.S.A. 44-536a(d).

Respondent argues the claimant settled her workers compensation case knowing that Dr. Trombold's bill would only be paid if Dr. Trombold found it to be related to her work injury. Absent that evidence there is nothing to support claimant's request. Respondent further argues the claimant is not seeking additional medical treatment and there is no basis to award payment of past medical bills at a post-award medical proceeding. In the alternative, respondent notes that only a minor portion of Dr. Trombold's billing was for treatment provided within six months of the filing of the application for post-award medical treatment. Finally, respondent requests attorney fees and costs because the filing of the application, in the absence of the required evidence from Dr. Trombold, constituted a frivolous filing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant filed an application for post-award medical seeking payment of outstanding medical bills. The facts that lead to the filing of the application are essentially undisputed. The claimant suffered a work-related injury on August 27, 2000, when the gas station where she worked was robbed. During the robbery the claimant was struck in the

head and suffered a gunshot wound which passed through her arm with the bullet lodging in her chest.

On December 30, 2004, a settlement hearing was held on the claim for workers compensation. An issue was raised regarding payment of the medical bills from Dr. Trombold. Claimant's personal physician had referred claimant to Dr. Trombold because of pulmonary problems she was experiencing. Claimant contended the authorized treating physician for her work-related injury had referred her to her personal physician who, in turn, had referred her to Dr. Trombold. Respondent denied that the authorized treating physician had referred claimant to her personal physician and disputed that it was responsible for payment of Dr. Trombold's billings.

The parties continued to discuss the issue at the settlement hearing and respondent agreed it would pay the bills if Dr. Trombold indicated that his evaluation of claimant was related to the occupational injury.

MR. RIEDMILLER: So basically you are telling Dorine to either accept the 55,000 and assume that if they don't pay the bill she'll have to eat it?

MR. EISFELDER: With the understanding that I will follow up with the doctor and if it's related I will pay it, but if it is not related then it closes the case out entirely.

THE CLAIMANT: Say that again, what he just said.

MR. RIEDMILLER: Say that again, Bart.

MR. EISFELDER: With the understanding if we get something out of Dr. Trombold that says it's related, reasonable and necessary, to evaluate and/or treat residuals from the gunshot wound, then we'll pay it. But if we get something from him that says it is not related then it closes everything out. **And we are not looking at some kind of post-award hearing on this.** (Emphasis Added).

THE CLAIMANT: No, it's fine.

MR. RIEDMILLER: Do you understand that?

THE CLAIMANT: So we have to wait to settle this all together? Or is he saying settle this and if he gets something concrete that says that?

MR. RIEDMILLER: That there is some relation to the evaluation.

THE CLAIMANT: And if it is not related it's on me?

MR. RIEDMILLER: Right.

THE CLAIMANT: That's fair.

MR. RIEDMILLER: You will settle it with that contingency?

THE CLAIMANT: Yes.

MR. RIEDMILLER: I am trying to explain this to you so Bart understands this as well. But do you understand that if at a later date if we were to settle this claim today at a lump sum and at a later date Dr. Trombold says neither the evaluation or the problems you experienced in any way had anything to do with this workers' compensation bullet wound then those bills will be your responsibility?

THE CLAIMANT: Right.

MR. RIEDMILLER: Do you understand that and you are willing to accept that risk?

THE CLAIMANT: Right.¹

The claimant then expressed her opinion that the evaluation by Dr. Trombold was because of the fragments left from her bullet wound. Claimant's attorney noted that may have been what the doctor told her but there was nothing in writing from the doctor expressing that opinion. Respondent then suggested that the settlement hearing be postponed until the doctor could be contacted.

MR. RIEDMILLER: That's what he was telling you, but I would have to agree with Bart, we haven't seen that type of information in writing.

MR. EISFELDER: I guess I am thinking the more I am hearing all the conversations maybe we ought to postpone this settlement hearing and let me get something out to the doctor and find out as soon as we can and then reschedule a settlement hearing. I am hearing some hesitation with your client and I don't want any uncertainty and any concerns down the line.

THE CLAIMANT: I understand exactly what you are saying.

MR. RIEDMILLER: Do you want to go forward with the settlement?

THE CLAIMANT: I am trying to go forward with the settlement because my mind is made up today to settle it out and get it over with. And if I have to pay it, I will pay it. But if it's related and pending and it's concrete that it's tied into my injury then it's fair that they pay it.

MR. RIEDMILLER: All right. Well, Bart, are you okay with that?

MR. EISFELDER: Yes. We'll just include as part of this stipulation we'll go forward with trying to get an opinion with Dr. Trombold as to the relationship to the injury.

¹ P.A.H. Trans., Resp. Ex. 1 at 8-10.

If he opines that it is related to the injury and is reasonable and necessary to evaluate and related to the injury we'll pay it. If it is not, if he comes back and says it is not related then it will not be paid and there will not be any post award litigation, his decision will be final and complete resolution of any additional issues.

MR. RIEDMILLER: Is that agreeable Doreen?

THE CLAIMANT: That's agreeable. . . .²

The parties then proceeded with the lump sum settlement of the claim. The Special ALJ conducting the settlement hearing again noted the agreement that respondent would not pay Dr. Trombold's bills unless claimant could prove the relationship to the occupational injury.

THE COURT: And they are not going to pay that medical bill that we discussed earlier unless you can prove to them, or the doctor can, that it's authorized, that it's related to this injury.

THE CLAIMANT: Yes.³

Claimant then filed the instant Application for Post-Award Medical seeking payment of the disputed medical bills from Dr. Trombold. The ALJ denied the claimant's request to have respondent pay Dr. Trombold's medical bills. The ALJ concluded claimant specifically agreed to settle her claim with the understanding that respondent would pay Dr. Trombold's medical bills only if the doctor opined his evaluation and treatment was related to claimant's occupational injury. The ALJ further determined that claimant's authorized physician was Dr. Estivo and that claimant failed to prove he had referred claimant to Dr. Trombold, consequently Dr. Trombold's treatment was not authorized. Finally, the ALJ noted claimant had been examined by Dr. Trombold approximately 4 years after her occupational injury and his medical notes introduced at the post-award medical hearing did not establish that his evaluation and treatment of claimant was causally related to her occupational injury. The Board agrees and affirms.

Simply stated, the terms of the settlement agreement were not satisfied. It was agreed that respondent would pay Dr. Trombold's medical bills only if the doctor opined that his evaluation and treatment of claimant was related to her occupational injury. That opinion was not provided.

At the post-award medical hearing the claimant offered Dr. Trombold's contemporaneous medical notes from his examinations of the claimant. But at the

² *Id.* at 11-12.

³ *Id.* at 23.

settlement hearing claimant's counsel had agreed those notes did not address whether the evaluation and treatment was related to the occupational injury. The notes reference claimant's history of the gunshot wound but do not offer the definitive opinion such as what the parties agreed would be needed to resolve the issue. It is further noted claimant was referred for the evaluation due to shortness of breath and further notes her history of smoking up to a pack of cigarettes a day. As the ALJ noted, the medical notes do not indicate that the evaluation and treatment was related to claimant's occupational injury. The Board agrees.

In the alternative, the claimant argues that Dr. Trombold's evaluation and treatment was authorized based upon a referral from an authorized physician. But the record does not contain a referral from Dr. Estivo, whom the parties agree was the authorized treating physician for her occupational injury. Although claimant alleged that Dr. Estivo had referred her to her personal physician, she agreed he had determined that she was at maximum medical improvement for her occupational injury and that further treatment, if necessary, would be through her personal physician.⁴ Such a statement does not constitute a referral, instead it appears the authorized treating physician had concluded claimant was at maximum medical improvement and treatment had concluded for her occupational injury.

Finally, the Board denies respondent's request to assess attorney fees and costs against claimant and her attorney pursuant to K.S.A. 44-536a. It appears the resolution of this disputed issue was to be accomplished by inquiry of and response from Dr. Trombold, an inquiry that was not limited to claimant. Nonetheless, claimant contended that it proved that respondent was liable by introduction of the doctor's contemporaneous medical notes as well as claimant's testimony. Again, it was neither contemplated nor agreed by the parties that the dispute would be resolved in the fashion attempted by claimant. Respondent's request for payment of expenses and attorney fees is understandable based upon the agreement reached at the settlement hearing, but because this dispute could have been averted by either party simply making inquiry of the doctor and at the settlement hearing respondent's attorney said he would contact the doctor, it cannot be said that pursuing reimbursement for the medical bills in the fashion adopted by claimant was a frivolous pleading. It was, however, not a post-award request for medical treatment and should not have been presented as such.

AWARD

WHEREFORE, it is the decision of the Board that the Post Award Medical Award of Administrative Law Judge Nelsonna Potts Barnes dated July 22, 2005, is affirmed.

IT IS SO ORDERED.

⁴ P.A.H. Trans. at 17.

Dated this _____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 J. Sean Dumm, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director